BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JO ANN STEINERT Claimant VS. **DCM LIMITED** Respondent AND **TWIN CITY FIRE INSURANCE CO.** Insurance Carrier	)	Docket No. 1,036,265

ORDER

Respondent and its insurance carrier (respondent) request review of the January 12, 2009 preliminary hearing Order entered by Administrative Law Judge Pamela J. Fuller.

ISSUES

The Administrative Law Judge (ALJ) ordered respondent to pay for the medical treatment recommended by Dr. Fluter and to pay the unauthorized medical requested by the claimant.[1]

The respondent appeals this Order alleging the ALJ erred. Respondent contends claimant suffered an intervening accident on April 22, 2007, which severs respondent's liability for future benefits. Alternatively, respondent argues that the Board should find that the claimant suffered injury each and every working day upon return to work following her intervening accident, which would make DCM's insurance carrier on January 8, 2009 liable for future benefits. In the alternative, respondent argues the Board should remand the case back to the ALJ with instructions to review the evidence to determine the date of accident for claimant's microtrauma injuries.

[1] The issue of the unauthorized medical allowance was resolved by agreement at the hearing and is not at issue in this appeal.

Claimant argues that the ALJ should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

There is no dispute that claimant sustained a compensable right shoulder injury on August 23, 2006 when she was setting up tables at her employer's direction. She sought treatment with a chiropractor, but when the treatments caused her increased pain, she sought treatment from another chiropractor. That second chiropractor commenced treatment in December 2006 and her complaints continued but in April 2007, claimant slipped getting out of her car. This caused her to fall back on the car. According to claimant, immediately after this event, her ankle hurt but her shoulder complaints remained the same.

Claimant was referred to Dr. Reed (apparently at respondent's request) and he provided her with steroid injections in the right shoulder which gave her only limited relief. He then recommended that she undergo an orthoscopic procedure to further diagnose her condition, but when the existence of her April 2007 accident came to light, respondent failed to authorize any further treatment. Respondent maintains its liability is now terminated due to the intervening accident.

In support of his contention, respondent offers the report of Dr. William Reed who has opined that "the subsequent injury of April 2007 further aggravated the Workers' Compensation causally related injury of 08/23/06."[2] The balance of his report is somewhat equivocal as he does not have the "historical reference data" to make any evaluation of the causation aspects of this claim. Distilled to its essence, Dr. Reed maintains that if you believe that claimant had an accident on August 23, 2006 and another accident in April 2007, then the April 2007 accident is an exacerbation of the first accident.[3]

Claimant was also seen by Dr. George Fluter, at her attorney's request, who reviewed claimant's records and examined her before concluding that there is a causal/contributory relationship between claimant's current condition and her reported August 23, 2006 injury. Dr. Fluter recommended that claimant have x-rays, an EMG, an MRI, physical therapy and a TENS unit. Depending on the results of the diagnostic tests, further treatment modalities might be necessary.

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[2] P.H. Trans., Resp. Ex. 1 (Dr. Reed's April 7, 2008 report).

[3] *Id.*

The ALJ appointed Dr. Terrence Pratt to conduct an independent medical examination. Dr. Pratt examined claimant as well as her medical records and concluded that claimant's shoulder complaints were more pronounced after the April 2007 event. He also noted that there is no documentation in the records of anyone recommending a procedure for the shoulder prior to the aggravating event. And based on these facts, he seems to believe that the April 2007 event is the precipitating factor for the need for further shoulder treatment.

> It is my opinion that the April 21, 2007, fall at home resulted in permanent aggravation of the original work related accident occurring on August 23, 2006.[4]

The ALJ granted claimant's request for treatment and appointed Dr. Fluter as the authorized treating physician.

Respondent contends the ALJ erred in granting claimant's request. Respondent maintains the April 2007 accident effectively cut off all further liability for claimant's initial workers compensation claim. Where the respondent is asserting an intervening injury, it is respondent's burden to prove that the intervening injury was the cause of claimant's permanent impairment rather than the work-related injuries.[5]

Here respondent believes the opinions of Dr. Reed and Dr. Pratt support this contention. Respondent further argues that Dr. Fluter's opinions are flawed as he based his opinions on claimant's recitation of the events and her complaints and purportedly ignored the medical records of claimant's earlier treatment.

As always, cases involving fact scenarios such as this present difficult decisions and compel a brief review of the guiding principles. Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*[6], the Court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1).

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[4] *Id.*, Resp. Ex. 2 at 4 (Dr. Pratt's July 22, 2008 report).

[5] *Desautel v. Mobile Manor Inc.*, Nos. 262,971 & 262,972, 2002 WL 31103972 (Kan. WCAB Aug. 29, 2002). See also *Palmer v. Lindberg Heat Treating*, 31 Kan. App. 2d 1, 4, 59 P.3d 352 (2002).

[6] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*[7], the Court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig*[8], the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber*[9], the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."

There is also *Logsdon*[10] which allowed post-award medical treatment for a shoulder injury nearing 10 years after the initial compensable event. In *Logsdon*, the court concluded that the injured claimant's shoulder had never fully healed and the subsequent aggravation in a fall at home constituted a natural consequence of the original injury.

After reviewing the record as a whole, this member of the Board finds the ALJ's Order should be affirmed and finds this case more analogous to *Gillig* and particularly *Logsdon*. Obviously there is a difference of opinion between the physicians. Dr. Pratt and

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[7] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[8] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[9] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

[10] *Logsdon v. Boeing Co.,* 35 Kan. App. 2d 79 (2006).

arguably Dr. Reed believe the April 2007 accident constitutes a new and intervening accident. But even Dr. Pratt acknowledges that he has precious little diagnostic or objective information that pre-dates April 2007 which would substantiate his opinion that the April 2007 accident is new and independent of the underlying compensable injury. In contrast, Dr. Fluter finds that claimant's shoulder complaints pre-date her April 2007 accident based on both claimant's recitation of her complaints and his review of the chiropractic records.

Indeed, the claimant's own testimony establishes that she had shoulder problems immediately after her compensable injury. Those complaints were treated conservatively and when they did not resolve or significantly improve, she was referred to Dr. Reed for more aggressive treatment. Before that could fully develop, she had the April 2007 accident which injured her ankle. Claimant maintains her shoulder complaints remained the same following this event. Given this evidence, this scenario is very similar to that present in *Logsdon*.

The ALJ granted was apparently persuaded claimant's testimony and that of Dr. Fluter and granted her request. This Board Member finds that decision should be affirmed.

Respondent has also argued that the ALJ should have concluded that claimant's date of accident should be determined as claimant has alleged a series of microtramas. In essence, respondent (and its carrier) are attempting to shift the liability for respondent's claim to another subsequent carrier. While the transcript does contain a reference to a repetitive injury claim following the initial acute injury on August 23, 2006, this is an argument respondent did not assert at the preliminary hearing. Issues that are not brought forward to the ALJ will not be addressed on appeal.[11]

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[12] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Pamela J. Fuller dated January 12, 2009, is affirmed.

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[11] *McGarvey v. Footlocker Retail, Inc.*, No. 1,035,541, 2008 WL 2002926 (WCAB Apr. 24, 2008); *Woods v. Manpower*, Nos. 1,026,858 & 1,033,526, 2008 WL 2354920 (WCAB May 21, 2008).

[12] K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of March 2009.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge